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IN THE

# Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *et al.*,
*Petitioners*,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution.

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## INTEREST OF THE *AMICI CURIAE*

*Amici*'s members include state and local governments and officials throughout the United States. These officials "have long engaged in the commendable task of land use planning." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). They bring a vital perspective to regulatory takings issues, and they have submitted *amicus* briefs in many takings cases. *See, e.g., Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). *Amici* have a compelling interest in preserving their ability to adopt reasonable development moratoria and demonstrating that these moratoria do not constitute *per se* takings. Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

## SUMMARY OF ARGUMENT

1. Reasonable, temporary development moratoria are an essential and widely used tool of land-use planning. They temporarily preserve historic land-use patterns so that new development does not undermine planning efforts. They also allow state and local officials to address threats to public safety from floods, fires, and the like. Courts regularly uphold reasonable moratoria against takings challenges, and they use the multifactor inquiry under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the Due Process Clause, and state-law doctrines to strike down moratoria that

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs, and on September 6, 2001, they filed a blanket consent.

are imposed in bad faith, unrelated to a legitimate purpose, or otherwise unreasonable. No court has adopted the sweeping *per se* rule proposed by petitioners.

2. The Tahoe moratorium is not a *per se* taking under *Lucas*. To prevail under *Lucas*, a landowner must show that regulation deprives the land of "all economically beneficial or productive use." 505 U.S. at 1015. *Lucas* and other precedents make clear that where existing or future uses allow land to be sold for more than nominal value, no *Lucas* taking has occurred. Petitioners, however, deliberately declined to introduce value evidence. In contrast, respondents provided expert appraisal evidence showing that the land covered by the Tahoe moratorium retained "reasonable economic value," Tr. 1408, with lots selling for as much as $110,000 in private sales at that time. J.A. 134. Petitioners' failure of proof defeats their *Lucas* claim.

Petitioners argue that a *per se* taking occurs where regulation denies a landowner the immediate ability to use land. But there is no "right of immediate use" whose temporary deprivation automatically gives rise to takings liability. Precedent governing the award of compensation in takings cases also counsels strongly in favor of ruling that there was no *Lucas* taking. Moreover, the relationship between the *Lucas per se* rule and the *Penn Central* multifactor inquiry reinforces the conclusion that no *per se* taking occurred.

3. Petitioners improperly conflate the clear distinction between physical occupations and land-use regulation that runs throughout takings jurisprudence. Nothing in *First English* obliterates this long-recognized distinction, which the Court reaffirmed as recently as last Term in *Palazzolo*.

## ARGUMENT

Petitioners advance a radical position. They argue that a temporary ban on all land use—"for whatever period of time"—is a *per se* taking under *Lucas*. Pet. Br. 47. No court has ever adopted such a sweeping *per se* rule.



The posture of this case leaves them no choice but to rely on this extreme theory. The trial court ruled (Pet. App. 88-92) that the Tahoe moratorium is not a taking under the multifactor inquiry set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), a ruling that petitioners did not appeal. Pet. App. at 18-19. Nor did they appeal the trial court's finding that the Tahoe moratorium was a good-faith (*id.* at 68-69) and "proportional" response (*id.* at 86) to threats posed by unplanned development. *See also id.* at 115 ("we do not see how TRPA could have reached agreement on a regional plan any sooner"). To prevail, petitioners must contend that *Lucas*'s *per se* rule applies to every temporary moratorium on land development, regardless of its duration or reasonableness.

Due to petitioners' radical argument, the stakes in this case extend far beyond Lake Tahoe, the precious natural resource at issue. Petitioners' *per se* rule would require compensation not only for temporary development moratoria, but also government-compelled temporary facility closures and many other regulatory actions that temporarily prohibit the use of land. Under petitioners' *per se* theory, these temporary restrictions would require compensation no matter how narrow in scope and duration, no matter how slight the economic impact on the landowner, and no matter how weighty the government justification.

In contrast, respondents take a moderate position. They acknowledge that moratoria may constitute a taking under *Penn Central*'s multifactor inquiry, but contend that moratoria do not constitute a *per se* taking in every case. As shown below, respondents' approach is the only one consistent with *Lucas* and other regulatory takings cases. This longstanding precedent preserves the ability of state and local officials to implement reasonable moratoria, but provides for compensation where a moratorium truly rises to the level of confiscatory government action.

Section I of this brief shows that petitioners' proposed *per se* rule would severely undermine land-use planning measures that protect public health, safety, and welfare. Section II demonstrates that petitioners cannot prevail under *Lucas* because they failed to show that the Tahoe moratorium left their land with little or no value. Section III shows that petitioners improperly ignore the long-recognized distinction between physical invasions and land-use restrictions that applies when determining whether a taking has occurred under the Fifth Amendment.[2]

## I. MORATORIA ARE AN ESSENTIAL AND WELL-ACCEPTED PART OF LAND-USE PLANNING.

1. State and local officials "have long engaged in the commendable task of land use planning, made necessary by increasing urbanization." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). Since the landmark ruling in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Court has upheld planning efforts used to enhance property values and protect communities. *See id.* at 394.

Moratoria are essential to sound planning. Comprehensive plans are not detailed blueprints for all future development, but instead a set of flexible policies that must be revised to meet changing conditions. Moreover, good land-use planning takes time. Absent a temporary delay in issuing new permits, planning could be undermined by new development. Courts

[2] In addition to arguing that all temporary denials of use are *per se* takings, petitioners assert that the Tahoe moratorium is permanent. This assertion goes beyond both the question presented and the record, which contains no evidence regarding whether the 1987 Regional Plan deprived petitioners' land of beneficial use. The record is silent on this issue precisely because the trial court dismissed the claims against the 1987 Plan as time-barred, *see* Pet. App. 128-55, a ruling affirmed on appeal, *see id.* at 47-56, and not included within the question presented.



long have recognized that planning efforts often trigger a rush to the permit office by developers hoping to obtain vested rights before new controls are implemented. *See, e.g.*, *Downham v. City Council of Alexandria*, 58 F.2d 784, 788 (E.D. Va. 1932) (planning "frequently precipitate[s] a race of diligence"; absent a moratorium, planning would be "like locking the stable after the horse is stolen"). Without moratoria, new construction could undercut planning measures before they see the light of day. *See Schafer v. City of New Orleans*, 743 F.2d 1086, 1090 (5th Cir. 1984) ("a moratorium may be necessary to prevent a plan's defeat before it is formulated").

Development moratoria also promote public participation in planning. Where moratoria authority is lacking, municipalities sometimes adopt hastily prepared, permanent controls insensitive to the needs of certain landowners. "[W]ith the adoption of an interim provision [the landowner] is made aware that a new plan is in the offing and is thus able to participate in the debate over what that new plan should contain." *Collura v. Town of Arlington*, 329 N.E.2d 733, 737 (Mass. 1975). The Tahoe moratorium, for example, allowed respondents to attend the many public meetings preceding the adoption of the permanent controls set forth in the Regional Plans. *See, e.g.*, Exhibit D-320, at p. 7 (observing that respondents "actively participated in the entire TRPA regional planning process leading to the adoption of the amended Regional Plan" and submitted comments at each public hearing on the Plan).

2. Development moratoria are used in a wide variety of contexts. They assist municipalities in addressing overburdened public services such as schools, roads, and sewers. To cite but one example, the town of Flower Mound, Texas—one of the fastest growing areas in the country—recently used a moratorium to assist in development of a comprehensive plan where uncontrolled growth threatened to overwhelm the

town's water, wastewater, and transportation systems. *See* Office of the Attorney General, Opinion No. JC-0142, 1999 WL 1028693 (Tex. A.G. Nov. 10, 1999). Moratoria facilitate historic preservation, floodplain manage-ment, protection of ecologically sensitive land, redevelop-ment of blighted urban areas, and revision of subdivision regulations. *See* 3 Patrick J. Rohan, ZONING AND LAND USE CONTROLS § 22.01 (1998).

Development moratoria also are used to address imminent threats to public health and safety. In *Cappture Realty Corp. v. Board of Adjustment*, 313 A.2d 624 (N.J. Super. Ct. 1973), the court upheld a three-year moratorium in flood-prone areas so that local officials could complete flood-control projects. Likewise, in *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988), the court upheld an 18-month moratorium on unstable slopes pending the adoption of appropriate construction guidelines. In *First English*, on remand from this Court, the state court upheld the challenged moratorium largely because it was imposed in response to floods that had drowned ten people and caused millions of dollars in property damage. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 895, 898-901 (Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

The 21st century is bringing unforeseen challenges requiring the use of moratoria. The City of Portland, Oregon recently used a moratorium to protect its investment in central-city streetcar infrastructure against unforeseen threats posed by "telco hotels." *See* Portland Ordinance 175298 (Jan. 31, 2001). Telco hotels are large buildings occupied by equipment for internet and telecommunication service providers. Because these facilities employ very few people, their proliferation threatened to undermine Portland's streetcar service by precluding higher-density uses in the streetcar corridor. *Id.* The moratorium allowed planners to achieve the higher density necessary to support streetcar



service and thereby help absorb the 500,000 new city residents expected over the next 20 years. *Id.*

Although some moratoria prohibit only certain kinds of development, municipalities sometimes find it necessary to prohibit all development to advance comprehensive planning efforts. Moreover, even a moratorium that is limited to particular uses is subject to claims that the remaining uses are not economically viable. Courts routinely uphold these temporary bans where they are reasonable in view of all relevant circumstances. *See, e.g., Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. Ct. App. 1992) (rejecting a takings challenge to a two-year moratorium on all development pending completion of a traffic-congestion study), *cert. denied*, 508 U.S. 960 (1993); *Williams v. City of Central*, 907 P.2d 701, 704-06 (Colo. Ct. App. 1995) (upholding a moratorium despite an allegation that it temporarily denied all use).

More than a dozen States have statutes that expressly authorize temporary development moratoria. 3 Rohan, *supra*, § 22.02[3][a], p. 22-17. Most other States have found that authority implicit in existing code provisions or home-rule authority. *See Collura*, 329 N.E.2d at 737 (upholding a two-year moratorium; "The weight of authority is that reasonable interim zoning provisions may be enacted within the scope of a general zoning enabling act . . . .").

Because moratoria are a traditional and necessary component of land-use planning, landowners cannot claim a "reasonable expectation[]," *Penn Central*, 438 U.S. at 125, to build at any specific time. Rather, it is reasonable to expect that state and local officials occasionally will adopt temporary moratoria where necessary to protect the public interest. *Cf. Lucas*, 505 U.S. at 1027 ("the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers"). This is especially

true in an ecologically fragile region that, in petitioners' words, contains "a unique treasure." Pet. Br. 3.

3. Because moratoria vary greatly in form and purpose, they are especially well-suited to takings analysis under *Penn Central*'s multifactor inquiry. In fact, courts long have used the *Penn Central* test, as well as the Due Process Clause and various state-law requirements, to ensure that moratoria are reasonable, related to legitimate goals, and imposed in good faith.[3] No court has embraced the sweeping *per se* rule proposed by petitioners.

Petitioners' proposed *per se* rule would severely limit, if not totally eliminate, the use of temporary bans on development and precipitate the very "race of diligence" (*Downham*, 58 F.2d at 788) between developers and planning authorities that courts have avoided through the application of existing precedent. The proposed *per se* rule would have particularly harsh impacts on small cities and towns that can ill-afford to defend takings claims brought by developers under unduly expansive theories of liability.[4] As Justice Kennedy has explained, inappropriately broad theories of takings liability unfairly subject "States and municipalities to the potential of new and unforeseen claims in vast amounts." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). Municipalities would be forced to choose between

[3] *Compare State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg*, 636 S.W.2d 430, 435 (Tenn. 1982) (upholding moratorium), *and Almquist v. Town of Marshan*, 245 N.W.2d 819, 825 (Minn. 1976) (same) *with Lake Illyria Corp. v. Town of Gardiner*, 352 N.Y.S.2d 54 (App. Div. 1974) (invalidating moratorium under state law due to its unreasonable length and other facts that showed lack of good faith).

[4] *See* S. Rep. No. 105-242, at 45 (1998) (minority views) (although the top four U.S. residential developers have annual revenues that exceed $1 billion, 90% of American cities and towns have less than 10,000 people and cannot afford even one full-time lawyer).



paying untold amounts in compensation under the proposed *per se* rule or abandoning legitimate planning efforts needed to protect neighboring landowners and the general public.

Petitioners' proposed *per se* rule also would lead to bizarre results wholly at odds with the standard of fairness that informs takings analysis. For example, it could generate claims where a moratorium causes no economic harm. A landowner could seek fair rental value for the duration of the ban even if the owner was unaware of the ban until after its expiration. The proposed *per se* rule also might lead to invalidation of needed moratoria notwithstanding the absence of economic harm.[5]

A *per se* rule also could require compensation where a moratorium does not interfere with a landowner's expectations. Petitioners seek compensation even though the trial court concluded that the 32-month Tahoe moratorium did not thwart reasonable expectations because Tahoe Basin landowners voluntarily held land and refrained from development for an average of 25 years after purchase. Pet. App. 88-89. Nor is there any principled basis for distinguishing moratoria from the normal delays that attend the development application process. The Constitution should not be read to require windfall compensation to landowners whose interests are unaffected by reasonable moratoria or other expected delays. *See Lucas*, 505 U.S. at 1033-34 (Kennedy, J., concurring in the judgment) (courts must consider whether takings claimants "had the intent and capacity to develop" during a development ban because "the test must be whether the deprivation is contrary to reasonable, investment-backed expectations").

[5] *Cf. Washington Legal Found. v. Texas Equal Access to Justice Found.*, 2001 WL 1222105 (5th Cir. Oct. 15, 2001) (granting injunctive relief in a regulatory takings case despite the lack of economic harm to the claimants).

## II. THE TAHOE MORATORIUM DID NOT EFFECT A *PER SE* TAKING UNDER *LUCAS*.

Petitioners come to this Court burdened with a striking evidentiary failure. They ask the Court to conclude that the Tahoe moratorium worked a *per se* taking under *Lucas* even though they deliberately declined to introduce evidence showing that the moratorium diminished the value of their land, much less rendered it valueless or nearly so. *See* Pet. App. 90. This section of the brief demonstrates that petitioners' evidentiary failure defeats their *Lucas* claim.

### A. *Lucas* Does Not Create A "Right To Immediate Use."

The *Lucas* Court held that a *per se* taking may occur where regulation deprives a landowner of "all economically beneficial or productive use of land." 505 U.S. at 1015. The Court made clear, however, that no *Lucas* taking occurs where existing or future uses allow the land to be sold to a private party for value. *Id.* at 1027-28. Indeed, the Court noted that in some situations, "the property's only economically productive use is sale." *Id.* at 1028. The Court stressed that a landowner with a 95% value loss may not "claim the benefit of our categorical formulation." *Id.* at 1019 n.8. In other words, the ability to sell land for significant value is a beneficial use that defeats a *Lucas* claim, even where the value is relatively small as compared to the value of the land if left unregulated. In his opinion concurring in the judgment, Justice Kennedy agreed that *per se* treatment is appropriate only where land is left with "no significant market value or resale potential." *Id.* at 1033-34.[6]

[6] The record and posture of *Lucas* starkly presented the Court with the issue of whether a complete obliteration of value works a taking. In the first paragraph, the Court recited the trial court's finding that the development ban at issue rendered Lucas's land "valueless." 505 U.S. at 1007. The Court then articulated the question presented as whether the development ban effected a taking due to its "dramatic effect on the economic value of Lucas's lots." *Id.* In delineating the *per se* rule, the Court again emphasized the key factual predicate that underlies the *per se* rule: the trial court's finding that the lots had been "rendered valueless." *Id.* at 1020. The pivotal nature of this finding is evidenced both by the skepticism regarding its accuracy expressed by each of the four separate opinions, as well as the Majority's specific response to those concerns. *Compare id.* at 1020 n.9 (Majority) *with id.* at 1034 (Kennedy, J., concurring in the judgment); *id.* at 1043-44 (Blackmun, J., dissenting); *id.* at 1065 n.3 (Stevens, J., dissenting); *and id.* at 1076 (Souter, J., statement). The *Lucas* Court also distinguished earlier cases that found no taking because "[n]one of them . . . involved an allegation that the regulation wholly eliminated the value of the claimant's land." *Id.* at 1026 & n.13. One of the cases so distinguished—*Hadacheck v. Sebastian*, 239 U.S. 394 (1915)—involved a value loss of 92.5% (from $800,000 to $60,000), further showing that *Lucas*'s *per se* rule applies exclusively where land is left valueless or with only nominal value.



In last Term's *Palazzolo* ruling, the Court reaffirmed that the *Lucas per se* rule is inapplicable where land retains more than nominal value. *Palazzolo*, 121 S. Ct. at 2465 (rejecting Palazzolo's *Lucas* claim because "petitioner failed to establish a deprivation of all economic value"); *see also id.* at 2476 (Ginsburg, J., joined by Souter & Breyer, JJ., dissenting) ("a floor value was all the State needed to defeat Palazzolo's simple *Lucas* claim"). To be sure, *Palazzolo* clarified that the government may not defeat a *Lucas* claim by showing that the landowner retains only "a few crumbs of value," *id.* at 2464 (quoting Brief for Petitioner), or what the Court called "token" value, *id.*, but the ruling reaffirmed that a *Lucas* claim lies only where regulation leaves land with nominal or no value.[7]

[7] Palazzolo alleged that he retained only 6% of his land's $3,150,000 unregulated value, but this assertion was not enough to support a *Lucas* claim. *See* 121 S. Ct. at 2456, 2464-65. This result is not surprising in view of the *Lucas* Court's observation that a 95% value loss does not trigger the *Lucas per se* rule. *See* 505 U.S. at 1019 n.8.

Other cases confirm this bedrock principle. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court stressed that the beneficial-use inquiry requires examination of the "diminution in market value" caused by the challenged regulation. *Id.* at 262, 263 n.9. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court could not determine whether the claimants were denied beneficial use of their property because "[t]here is no record as to what value" the property had. *Id.* at 502 n.29. Federal appeals courts and state supreme courts properly adhere to this Court's rulings that land has no economically beneficial use only where it is left with nominal or no value.[8]

Petitioners understandably sidestep this adverse precedent and attempt to shift the focus from value to immediate use. Their suggested dichotomy between use and value is a false choice because, as shown above, there is no *Lucas per se* taking where existing and future uses allow the owner to recoup value through sale to a private party. Nevertheless, petitioners argue that *Lucas* establishes an absolute right to

[8] *See, e.g., Rith Energy, Inc. v. United States*, 2001 WL 1380899 at 1 (Fed. Cir. Nov. 5, 2001) (On Petition for Rehearing) ("The [*Palazzolo*] Court held that because Mr. Palazzolo retained some economic value in the regulated property, the denial of a building permit in Mr. Palazzolo's case did not constitute a categorical taking."); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 & n.5 (4th Cir. 1998) (no *Lucas* taking where land retains value); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 903 (Fed. Cir. 1986) (five judge panel) (sale of land for value "would be a sufficient remaining use of the property to forestall a determination that a taking had occurred"), *cert. denied*, 479 U.S. 1053 (1987); *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418, 424 (2d Cir. 1983) ("the key question" in a takings case is whether others "might be interested in purchasing all or part of the land"); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998) ("Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action."), *cert. denied*, 526 U.S. 1144 (1999).



use land immediately, and that a *per se* taking occurs whenever regulation temporarily prohibits land use, regardless of the regulation's effect on value.

No court has ever recognized such an absolute constitutional "right to build *immediately*" whose temporary deprivation works a *per se* taking. *Lucas* describes its *per se* rule as applying where regulation denies all beneficial use of land, 505 U.S. at 1015, not where it denies only the immediate ability to use the property. Petitioners' proposed *per se* rule would lead to *per se* treatment run amok in contravention of this Court's recognition that *per se* rules have a very limited role in takings jurisprudence. *See Lucas*, 505 U.S. at 1017-18 (*Lucas*'s *per se* rule applies only in "extraordinary" and "relatively rare" circumstances); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (whether a regulation effects a taking "is a question of degree—and therefore cannot be disposed of by general propositions"); *see also Palazzolo*, 121 S. Ct. 2467 (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted.").

### B. Petitioners' Land Retained Both Use And Reasonable Economic Value, Thereby Foreclosing A *Per Se* Taking Under *Lucas*.

1. This case involves only a facial challenge. *See* Pet. App. 19 ("Our focus is . . . narrowed by the fact that the plaintiffs bring only a facial challenge to Ordinance 81-5."). Petitioners therefore "face an uphill battle . . . since it is difficult to demonstrate that mere enactment of a piece of legislation deprived [the owner] of economically viable use of his property." *Suitum*, 520 U.S. at 736 n.10 (quoting *Keystone*, 480 U.S. at 495 and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (internal quotation marks omitted)).

Despite their heavy burden, petitioners pursued a risky legal strategy. Believing that they could prevail under *Lucas* simply by showing that they were deprived of the right to develop immediately, petitioners declined to offer evidence as to the moratorium's impact on property value. Unlike Mr. Lucas, who proved that his property had been rendered "valueless," *Lucas*, 505 U.S. at 1007, 1020, petitioners moved to exclude all value evidence. Pet. App. 92. After the trial court denied that motion, petitioners failed to meet their burden of showing that the moratorium left their land with little or no value. They offered no evidence at all regarding the effect of the Tahoe moratorium on the value of their land.[9]

In the words of the trial court, petitioners made a "calculated choice" to introduce "no evidence regarding the specific diminution in value of any of the [petitioners'] individual properties." Pet. App. 90. In ruling on the *Penn Central* claim, the trial court concluded that "[s]ince the burden is on the plaintiffs to show that a taking occurred (and since that burden is especially heavy in a facial challenge such as this), the fact that they agreed not to introduce this type of evidence works against them." *Id.*

With respect to petitioners' *Lucas* claim, this calculated choice not only "works against them," it was a fatal error. Their strategy leaves them in the untenable position of

[9] Petitioners' appraiser conceded that he was "not rendering an estimate of value." Tr. 1555. While he testified that, in his opinion, petitioners' land was not economically viable during the moratorium, he premised this conclusion on a definition of economic viability that required a "return to the buyer in terms of the cost of acquisition of the property, any holding costs, and any anticipated profits." Tr. 1562. Mr. Palazzolo similarly argued for a rate-of-return definition of economic viability (*Palazzolo*, Pet. Br. on the Merits, at 36-44), a definition that this Court rejected. *See Palazzolo*, 121 S. Ct. at 2464-65; *see also United States v. Powelson*, 319 U.S. 266, 285 (1943) (the Fifth Amendment does not guarantee a return on investment).



arguing, without a scintilla of supporting evidence in the record, that a moratorium that preserves historic land-use patterns for less than three years left their property with little or no value. Their effort fails *ab initio* and respondents would have been entitled to a directed verdict on the *Lucas per se* claim at the close of petitioners' case, had they so moved.[10]

2. Petitioners' trial strategy is readily explained by the appraisal evidence they sought to exclude. Petitioners simply had no good alternative. Respondents showed at trial that land covered by the moratorium retained both use and "reasonable economic value." Tr. 1408.

Respondents' evidence of remaining use and value was provided by Steven Johnson, an experienced appraiser who has appraised thousands of lots in the Tahoe Basin. *Id.* at 1380. Johnson first noted that the average holding time of a vacant lot in the Tahoe area between lot purchase and home construction is twenty-five years. *Id.* at 1394; 1435-41. Thus, the moratorium had no impact on most landowners in the Basin.

More importantly, Johnson testified that buyers were willing to pay substantial prices for restricted lots during the moratorium for several reasons. Some buyers purchased lots simply to own land in the Tahoe Basin. *Id.* at 1465. Others purchased with the hope that development ultimately would

[10] Remarkably, petitioners assert (Br. 48) that the trial court "found" and the Ninth Circuit "affirmed" that the moratorium precluded all economically productive use. There was no such finding or affirmation. The purported "finding" (Pet. App. 99) is in a section of the trial court opinion entitled "Conclusions of Law." *Id.* at 82. More importantly, the Ninth Circuit ruled that the trial court's assertion was based on an erroneous "legal conclusion" (*id.* at 40 n.30) that "misread[s precedent] in at least two ways." *Id.* at 37 n.25. In other words, the court of appeals expressly repudiated on legal grounds the very determination that petitioners claim was affirmed.

be permitted. *Id.* at 1395, 1464. Sophisticated developers bought lots that had the potential to be reclassified and permitted for development. *Id.* at 1395. Adjacent property owners purchased lots to protect their open space and view corridors (*id.* at 1395), to secure the privacy, seclusion, and control that ownership conveys (*id.* at 1470), and to increase the land coverage for development that would be permitted on the adjacent parcel. *Id.* at 1395-96, 1401-05.

Johnson identified many private sales of restricted parcels throughout the Tahoe Basin. The record shows that properties comparable to petitioners' sold to private parties for as much as $110,000 from 1981 to 1987. J.A. 134; Tr. 1409. Prices for class 1-3 lots in Nevada ranged from $6,000 to $95,000. J.A. 131; Tr. 1396-1400. Prices for class 1-3 lots in California ranged from $10,000 to $18,415. J.A. 132; Tr. 1400-03. Prices for Stream Environment Zone lots ranged from $5,000 to $110,000. J.A. 134, Tr. 1408-11. Based on this and other evidence, Johnson concluded that lands covered by the moratorium had "reasonable economic value" in the open market during the moratorium. Tr. 1408; *see also id.* at 1410-15.

Petitioners' failure to offer value evidence defeats their *Lucas* claim. Johnson's testimony showing that their lots retained "reasonable economic value," Tr. 1408, confirms that this result was inevitable.[11]

[11] All land in the Tahoe Basin retains value in large measure due to the protections for Lake Tahoe. A major component of the value of property in the Basin comes from its proximity to the Lake, a precious natural resource which is world-renowned for its clarity and serves as the engine of the Basin's economy. *See* Pet. App. 84 ("[T]he beauty of Lake Tahoe is largely responsible for driving the economy of the region, which is based almost entirely on tourism."). Without the protections challenged in this case, the Lake would turn green (*id.* at 4-6, 61-65) and land values in the region would plummet.



### C. Longstanding Precedent Governing Just Compensation Supports Consideration Of Petitioners' Remaining Uses And Value In Evaluating Their *Lucas* Claim.

Petitioners assume that the available uses of their land during the moratorium—for example, future uses and use for sale to neighboring property owners—are irrelevant to Fifth Amendment analysis. But for more than a century, this Court has taken these same uses into account in assessing value and just compensation in direct condemnation cases. These rulings leave no doubt that the uses of petitioners' land available during the moratorium are "highest and best uses" that must be considered in determining value in takings cases.

For example, in *Olson v. United States*, 292 U.S. 246 (1934) (cited with approval in *Palazzolo*, 121 S. Ct. at 2461), this Court held that just compensation is determined by reference to the "highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future." 292 U.S. at 255. The uses valued for compensation purposes in *Olson* were future, potential uses for farming and as a fishing station. *Id.* at 254.

Fifty years earlier, in *Boom Co. v. Patterson*, 98 U.S. 403 (1878), the Court determined that takings analysis must consider the potential uses of a parcel in conjunction with adjacent parcels. *Patterson* addressed the compensation due the owner of three unused islands in the Mississippi River. The Court awarded compensation based on the islands' potential use by timber companies along the riverbanks to form (in conjunction with riverfront lots) a natural boom to store harvested trees. *Id.* at 408. In *United States v. Fuller*, 409 U.S. 488 (1973), then-Justice Rehnquist, writing for the Court, summarized the law by stating: "This Court has held that generally the highest and best use of a parcel may be found to be a use in conjunction with other parcels, and that any increment of value resulting from such combination may

be taken into consideration in valuing the parcel taken." *Id.* at 490 (citing *Olson*, 292 U.S. at 256).

Under these precedents, landowners are routinely awarded compensation for the unique value of their lots for sale to abutting property owners. *Louisiana v. Nassar*, 512 So.2d 1221, 1224 (La. Ct. App. 1987) (compensation awarded based on potential sale of land to an abutting landowner); *City of Lafayette v. Richard*, 549 So.2d 909, 911-12 (La. Ct. App. 1989) (same); *see also Claridge v. New Hampshire Wetlands Board*, 485 A.2d 287, 289 (N.H. 1984) (denying a takings claim due to "evidence in the record that tends to show that the land could be sold to abutters"). Courts award such compensation even where the land must be preserved in its natural state. *See Assateague Island Condemnation Cases*, 356 F. Supp. 357, 360-62 (D. Md.) (compensation awarded for non-developable, marshland tract based on its value for use in assembly with adjacent property), *aff'd*, 487 F.2d 1397-99 (4th Cir. 1973) (unpublished table decisions).

There are a host of reasons for this Court to look to direct condemnation cases in determining the uses that can be considered in assessing a *Lucas* claim. These cases address a similar legal question under the same constitutional provision. They render a fair and nuanced answer that will not please landowners or government agencies in every case. For example, these cases would support the rule that a government purchase offer does not establish market value and thereby defeat a *Lucas* claim. *See United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961) (compensation due for a taking is actual value lost, and that value "must be neither enhanced nor diminished by the special need which the government had for it").

Finally, using the principles established by direct condemnation cases in evaluating an inverse condemnation claim promotes fairness. In direct condemnation disputes, landowners argue for consideration of potential uses that



would result in a larger compensation award, whereas in *Lucas* claims landowners seek to show that no beneficial use remains. It would be unfair to require the taxpayers to compensate landowners based on value derived from these uses in direct condemnation cases, but then prohibit the government from relying on such value in defeating an inverse condemnation claim. Simple fairness requires a ruling that the beneficial uses available to petitioners during the moratorium defeat their *Lucas* claim.

### D. Petitioners' *Per Se* Rule Would Create Doctrinal Chaos Under The Takings Clause.

This case comes to the Court with the unchallenged ruling that the Tahoe moratorium is not a taking under the *Penn Central* multifactor inquiry. *See* Pet. App. 18-19. The trial court concluded that every factor in the *Penn Central* inquiry cuts in favor of petitioners and against respondents. *Id.* at 88-92. To *amici*'s knowledge, no other court has held that a regulation survived the *Penn Central* inquiry and yet worked a *per se* taking. This section shows that due to the integrated relationship between the *Penn Central* inquiry and the *per se* takings rules, the unchallenged *Penn Central* determination reinforces the conclusion that no *per se* taking occurred under *Lucas*.

Properly understood, the *per se* rules recognized in *Lucas* and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), are simply dispositive applications of the *Penn Central* multifactor inquiry. Under *Penn Central*, a court considers three factors: (1) "the economic impact of the regulation;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124. The *per se* rules are specific applications of the first (*Lucas*) and third (*Loretto*) factors. They apply where one of those factors weighs so heavily in favor of a taking that the other factors become academic. These rules

are deemed "categorical" because they make it unnecessary to examine the other factors that inform takings analysis under *Penn Central*.

The integration of the *per se* rules and the multifactor inquiry is evident from both *Loretto* and *Lucas*. In *Loretto*, after noting that *Penn Central* looks to the character of the government action, the Court explained that "when the physical intrusion reaches the extreme form of a permanent physical occupation . . . . 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative." 458 U.S. at 426. The *Lucas* Court also articulated its *per se* rule within the general context of *Penn Central*. *See* 505 U.S. at 1015. *Loretto* and *Lucas* are not independent tracks of analysis, but instead dispositive applications of the multifactor inquiry that generally drives takings analysis.

The Supreme Court's use of *per se* takings rules follows its use of *per se* rules in other areas of the law. In antitrust law, for instance, the Court employs a multifactor "rule of reason" to evaluate business practices. But it derives rules of *per se* liability "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the [multifactor] rule of reason will condemn it." *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982). It would be unthinkable to conclude that a trade practice meets the rule of reason but nonetheless constitutes a *per se* violation of the antitrust laws. In the same way, it turns logic on its head to argue that a regulation constitutes a *per se* taking even though it is not a taking under *Penn Central*. *See Loretto*, 458 U.S. at 435 n.12 (comparing the *per se* rules for takings with the *per se* rules in antitrust law).

In short, petitioners' position presents a stark doctrinal anomaly. Just as a business practice cannot survive the rule of reason and yet constitute a *per se* antitrust violation, a land-use regulation cannot survive *Penn Central* and yet



constitute a *per se* taking. Because it is now undisputed that petitioners' *Penn Central* claim fails, their *Lucas* claim necessarily fails as well.[12]

## III. PETITIONERS' ATTEMPT TO BLUR THE DISTINCTION BETWEEN PHYSICAL INVASIONS AND LAND-USE REGULATION CONTRAVENES THE ENTIRE CORPUS OF REGULATORY TAKINGS JURISPRUDENCE.

1. Respondents establish that the *First English* ruling is limited to remedies and does not reach the question of when a regulation works a taking. Indeed, the moratorium challenged in *First English* ultimately was held not to constitute a taking. *First English*, 258 Cal. Rptr. at 901-07. There is no need to repeat respondents' demonstration here.[13]

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[12] Petitioners rely heavily on Justice Brennan's dissent in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), but it is incongruous to suggest that Justice Brennan would have embraced their extreme *per se* rule. As the author of *Penn Central*, Justice Brennan was keenly aware of the need to avoid sweeping rules of liability in takings cases. *See Penn Central*, 438 U.S. at 124 (regulatory takings analysis entails "ad hoc, factual inquiries" that depend "largely 'upon the particular circumstances'" of the case) (citation omitted). The *San Diego Gas* dissent itself recites the *Mahon* admonition that the takings inquiry is "a question of degree—and therefore cannot be disposed of by general propositions." 450 U.S. at 649 (quoting *Mahon*, 260 U.S. at 415). Moreover, Justice Brennan wrote several opinions that reject conceptual severance, *see, e.g., Penn Central*, 438 U.S. at 130-31; *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), a result directly at odds with petitioners' position. *See* Pet. App. 20-28.

[13] Petitioners argue that *First English* goes beyond remedial issues, but petitioners' counsel, who also represented the landowners in *First English*, had a much narrower view of *First English* when that case was argued. *See First English*, Brief for Appellant at 5 ("B. The Only Issue In The Case At Bench Is The Proper Remedy For A Regulatory Taking"); *id.* ("this case contains no issue of whether a taking occurred").

It is worth noting, however, that petitioners would treat regulatory protections even more severely than physical invasions. Under their reading of *First English*, a temporary restriction on beneficial use is a *per se* taking, even though under *Loretto* a temporary physical invasion is subject to *Penn Central*'s multifactor inquiry. *Loretto*, 458 U.S. at 435 n.12. Petitioners make little effort to justify this odd result.

2. In addition to mischaracterizing the *First English* holding, petitioners argue that *First English* worked a sea change by merging the liability standards for physical invasions and land-use regulations. To be sure, *once a taking is established*, there is no difference between physical occupations and land-use restrictions, for in either case the Fifth Amendment requires compensation. *See First English*, 482 U.S. at 314-22. But with respect to the question of whether a taking has occurred, petitioners could not be more wrong in suggesting that there is no difference between physical occupations and land-use regulation.

Takings law always has distinguished physical invasions from land-use restrictions. For the first 150 years of our nation's history, the Takings Clause applied only to the direct condemnation or physical appropriation of property. *Lucas* 505 U.S. at 1014 ("Prior to Justice Holmes's exposition in [*Mahon*] it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'") (citations omitted).

In *Mahon*, Justice Holmes explained that a regulation works a taking only where it "goes too far." 260 U.S. at 415. Land-use regulations that simply "adjust[] the benefits and burdens of economic life to promote the common good" are far less likely to work a taking than a physical invasion. *Penn Central*, 438 U.S. at 124. In fact, a land-use control effects a taking only where the regulation approximates a physical appropriation. *See Williamson County Reg'l Planning*



*Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985) (in a regulatory takings case, the Court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property").

In contrast to the deferential standard for land-use regulation, a government-compelled permanent physical occupation constitutes a *per se* taking without regard to its economic impact. *Loretto*, 458 U.S. at 434-35. In requiring *per se* treatment, the *Loretto* Court reaffirmed "the distinction between a permanent physical occupation . . . and a regulation that merely restricts the use of property." *Id.* at 430. *Loretto* explains that the special treatment given to a physical invasion derives from the right to exclude, "traditionally . . . considered one of the most treasured strands in an owner's bundle of property rights." *Id.* at 435.

The Court has reaffirmed the distinction between physical invasions and land-use regulations time and again. Earlier this year, the *Palazzolo* Court observed that physical takings are "[t]he clearest sort of taking" that require compensation even for a "minimal" intrusion, while a regulation requires compensation only where it "goes too far" under *Mahon*. *Palazzolo*, 121 S. Ct. at 2457. The distinction between invasions and regulation is so clear that the Court unanimously has held that a regulatory taking issue is not fairly included within a question presented concerning a physical taking. *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) ("Consideration of whether a regulatory taking occurred would not assist in resolving whether a physical taking occurred as well. . . . [The two issues] exist side by side, neither encompassing the other.").

In arguing that regulatory takings should be treated like physical takings, petitioners rely on wartime takings cases, but they entirely disregard *Loretto*'s careful treatment of two key wartime cases: *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), and *United States v. Central Eureka Mining*

*Co.*, 357 U.S. 155 (1958). The *Loretto* Court explained that in *Pewee Coal*, the Court found a taking where the government took possession of a coal mine to prevent a strike of coal miners. *Loretto*, 458 U.S. at 431. In *Central Eureka*, however, the Court found no taking where the government required gold mines to cease operating for almost three years. *Loretto*, 458 U.S. at 431-32 (citing *Central Eureka*, 357 U.S. at 165-66). The *Loretto* Court emphasized that the temporary denial of all use in *Central Eureka* stood in sharp contrast to the physical invasion in *Pewee Coal*. *Loretto*, 458 U.S. at 431-32.

In short, petitioners' blurring of physical invasions and regulatory restrictions is inconsistent with the entire body of takings jurisprudence that preserves the distinction.

3. Petitioners' proposed merger of physical and regulatory takings also could lead to *per se* treatment of other workaday land-use restrictions. For example, *amicus* Institute for Justice (Br. 17-20) argues that the Court should overrule *Penn Central* insofar as it holds that in evaluating the economic impact of a regulation, courts should look to the regulation's effect on the claimant's entire parcel, not just the affected portion. As this Court recognizes, however, *Penn Central*'s parcel-as-a-whole rule is critical to a fair and measured application of the Takings Clause. Without it, setback requirements and other reasonable land-use practices would be compensable and thus financially ruinous to impose. *See, e.g., Keystone*, 480 U.S. at 498 (without the parcel-as-a-whole rule, "one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes").

*Amicus* Institute for Justice's extraordinary proposal to overrule the parcel-as-a-whole rule is the logical conclusion of petitioners' illicit merging of liability standards for



physical invasions and land-use controls. Because a government-compelled, permanent physical occupation is a taking no matter how small the intrusion, a merging of liability standards would require compensation for any denial of use on any portion of a parcel, no matter how small. Nothing in the Takings Clause warrants this extreme result.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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